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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF *AMICI CURIAE* ARKANSAS POWER & LIGHT COMPANY LOUISIANA POWER & LIGHT COMPANY NEW ORLEANS PUBLIC SERVICE INC. IN SUPPORT OF APPELLEES

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On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI* [1]

Arkansas Power & Light Company (AP&L), Louisiana Power & Light Company (LP&L) and New Orleans Public Service Inc. (NOPSI) are electric utilities operating within the states of Arkansas, Louisiana and Missouri, and together with Intervenor Mississippi Power & Light Company they operate an integrated electric system as wholly-owned subsidiaries of Middle South Utilities, Inc. See Appellants' Brief at 23 n.30. All three *Amici* are affected by provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA) [2] at issue here: each is subject to Title I and Section 210 of PURPA, 16 U.S.C. (Supp. III) 2611-44, 824a-3; and NOPSI and Associated Natural Gas Company, a wholly-owned subsidiary of AP&L, are also subject to Title III of PURPA, 15 U.S.C. (Supp. III) 3201-11. In addition, AP&L and LP&L are subject to Federal

[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of the Court.

[2] Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*

Energy Regulatory Commission (FERC) jurisdiction with respect to certain sales for resale of electric power and energy; and with respect to retail sales, AP&L is subject to the jurisdiction of the Arkansas Public Service Commission, the Louisiana Public Service Commission, the Missouri Public Service Commission and the Tennessee Public Service Commission, LP&L is subject to the jurisdiction of the Louisiana Public Service Commission and the Council of the City of New Orleans (for the Fifteenth Ward of New Orleans), and NOPSI is subject to the regulatory jurisdiction of the Council of the City of New Orleans.

The provisions of Titles I and III and Section 210 of PURPA directly intrude upon and substantially modify the procedures and substance of the jurisdiction exercised by these state and local regulatory authorities over *Amici*. These effects on the regulatory authorities would, in turn, require *Amici* to devote substantial additional resources to resolution of the matters set forth in Titles I and III and Section 210 of PURPA.

SUMMARY OF ARGUMENT

1. Last term the Court undertook "a careful review of the actual basis and import" of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to determine whether the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[3] on its face violated the Tenth Amendment, and found that it did not. *Hodel* v. *Virginia Surface Mining and Reclamation Association*, ___ U.S. ___, 101 S.Ct. 2352, 2365 (1981). The instant case presents a similar challenge to PURPA, but under the *Virginia Surface Mining* restatement of the *National League of Cities* tests, the sections of PURPA here at issue are unconstitutional because they violate "attributes of sovereignty attaching to every state government which may not be impaired by Congress," *Virginia Surface Mining, supra*, 101 S.Ct., at 2365 (quoting *National League of Cities, supra*, 426 U.S., at 845).

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[3] 30 U.S.C. (Supp. III) 1201 *et seq.*

Specifically, the portions of PURPA in suit regulate state regulation of commerce, as distinct from commerce itself, and as such regulate "the States as States." By purporting to enact both state substantive and procedural law for the states and requiring the states to implement a federal program, in effect legislating for the states, PURPA regulates an undoubted attribute of state sovereignty, namely the power to decide whether — if at all — to legislate. And by restructuring the states' procedures and agenda for public utility regulation PURPA has not only impaired, it has commandeered the states' ability to structure their own machinery for regulation of natural monopolies, a traditional state governmental function.

Unlike SMCRA, the states are not free under PURPA to ignore the federal intrusion and leave enforcement to the federal government. The states *must* abide by the federal agenda under federal procedures, or be faced with federal executive branch intervention enforceable in federal district court. This is precisely the sort of affirmative obligation that has been struck down by three courts of appeals and apparently conceded by the Solicitor General in those cases to be unconstitutional. *EPA* v. *Brown,* 431 U.S. 99 (1977).

Furthermore, Chief Justice Taney's statement that the federal government "has no power to impose on a State Officer, as such, any duty whatever, and compel him to perform it," *Kentucky* v. *Dennison,* 65 U.S. (24 How.) 66, 107 (1861), remains as sound in principle as it is as precedent. Appellants and several *amici* in support of Appellants have incorrectly read *Testa* v. *Katt,* 330 U.S. 386 (1947), to the contrary. While we recognize that it would be more convenient for the federal government to be able to press state governments into its service, mere administrative convenience has never been held sufficient justification for unconstitutional intrusions.

2. Federalism concerns voiced by the Court in a variety of contexts strongly suggest that the national interest in preserving the restraints inherent in a dual system of reserved and delegated powers is sufficiently great that no "balancing" test should be applied. However, if such balancing is required,

PURPA still fails since less intrusive constitutional means are available to achieve the legitimate ends sought by Congress. Principles of federalism and comity evidenced in recent decisions of this Court aimed at moderating federal court intervention in states' affairs should be equally applicable to the federal executive and legislative branches. The values of pluralism inherent in a system of dual sovereignty should certainly not be accorded less weight in the context of energy legislation than in the context of, *e.g.*, antitrust legislation.

ARGUMENT

I

THE CHALLENGED PROVISIONS OF PURPA VIOLATE THE TENTH AMENDMENT.

We assume that "Congress could constitutionally have enacted a statute prohibiting any state regulation of [public utilities]," *Virginia Surface Mining, supra,* 101 S.Ct., at 2367, thus preempting the field. But that is not what the challenged sections of PURPA do. Instead PURPA commandeers the instruments of state government and compels those instruments to enforce a federal regulatory program, precisely the type of activity the Tenth Amendment forbids.

A. The *Virginia Surface Mining* Requirements Are Met.

Virginia Surface Mining states three "requirements," each of which must be satisfied in order to find otherwise valid congressional commerce power legislation invalid under *National League of Cities:*

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Virginia Surface Mining, supra, 101 S.Ct., at 2366 (citations omitted).

1. PURPA regulates the "States as States."

The Appellants do not address *Virginia Surface Mining's* first requirement, although they appear to concede that PURPA does indeed regulate the "States as States" ("To be sure, the statute in suit places certain regulatory responsibilities upon the states"), and they then include a brief and grudging list of provisions that "do more than 'allow' state regulation." Appellants' Brief at 28-29.[4] For the most part, Appellants have correctly described the actual mechanics of PURPA, Appellants' Brief at 3-12, but we wish to underscore certain portions of their description,[5] and describe certain additional features omitted from their description, that we consider to give rise to the constitutional infirmity under the Tenth Amendment. Sections 111 and 112 of Title I[6] *require* each state regulatory authority to consider whether to adopt six specific rate design standards within two years of enactment of PURPA, and to reach a decision whether to adopt the standards by November 8, 1981. Section 113 of Title I[7] *requires* each state regulatory authority to consider a second set of five specific standards relating to electric service, two of which are *required* to be considered in connection with gas utility service standards by Section 303 of Title III.[8] Section 114 of Title I,[9] although not set-

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[4] We are in agreement, however, with the argument in Appellants' Brief at 28-29, n.33, that PURPA is not subject to Tenth Amendment challenge to the extent that it applies to nonregulated utilities, regulates public utilities directly, or exempts certain parties from federal and state regulation. Of course, the constitutional validity of particular provisions of PURPA under the Commerce Clause does not necessarily save those provisions from falling with those that violate the Tenth Amendment. See note 47 *infra*.

[5] Italicized words in the description that follows are those used by Appellants to characterize the provisions of PURPA. See Appellants' Brief at 4-11.

[6] 16 U.S.C. (Supp. III) 2621-22.

[7] 16 U.S.C. (Supp. III) 2623.

[8] 15 U.S.C. (Supp. III) 3203.

[9] 16 U.S.C. (Supp. III) 2624.

ting a "standard," *requires* each state regulatory authority to consider rates below cost for certain residential customers (the so-called "lifeline rates") if the electric utilities it regulates do not have such rate schedules in effect by November 1980.

Titles I and III *prescribe* the procedures to be followed by each state regulatory authority in making its determinations, *prescribe* who has standing to intervene in the regulatory authority's proceedings, including intervention as of right, enforceable in the federal courts, by the Secretary of Energy, and *require* state courts to confer standing on "any person" to bring an enforcement action in the state's courts to compel the state regulatory authority to comply with the foregoing substantive and procedural rules.[10] Furthermore, any person who has intervened or otherwise participated in the original proceeding (including the Secretary of Energy) may obtain record review in state court of any determination by the state regulatory authority with respect to the adoption of Title I standards.[11] These standing, intervention and record review provisions work a massive intrusion into the states' ways of conducting their own affairs. Louisiana, for example, does not tolerate intervention by just "any person," but confines intervention by third persons to those "having an interest therein." La. Code Civ. Pro. Ann. Art. 1091 (West).

Section 210(f) of PURPA[12] *requires* the state regulatory authority, after notice and opportunity for hearing, to *implement* regulations to be promulgated by the Federal Energy Regulatory Commission (FERC) concerning the rates that must be paid by electric utilities for energy purchased from qualifying cogenerators and small producers of electricity. Section

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[10] 16 U.S.C. (Supp. III) 2623(c), 2631, 2633(b)(1); 15 U.S.C. (Supp. III), 3205, 3207(a)(2), 3207(b)(2).

[11] 16 U.S.C. (Supp. III) 2633(c)(1). Furthermore, the Secretary is *required* to be allowed to participate as *amicus curiae* in any judicial review proceeding initiated by others respecting Title III standards. 15 U.S.C. (Supp. III) 3207(b)(2).

[12] 16 U.S.C. (Supp. III) 824a-3(f).

210(h)[13] allows FERC to *enforce* this requirement in federal court, as can any utility or qualifying facility.

We submit that PURPA does, indeed, do more than "allow" state regulation: Appellants' own description of the law admits that it regulates the procedures by which the states' own policies are to be given effect and dictates additional substantive policies that the states must consider; it confers standing on "any person" to bring an action in state courts to enforce the very provisions of PURPA that regulate the states' regulatory machinery; it confers standing on the Secretary of Energy to intervene in state regulatory proceedings regardless of what substantive rules the states may have in place to regulate interventions as of right; it requires federal district courts to compel such intervention should the states resist; and it commandeers the regulatory apparatus of the states to enforce the federal regulation of cogeneration transactions.

On its face, then, PURPA works no mere preemption or displacement of state law. Nor is it a mere regulation of "individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside." *Virginia Surface Mining, supra,* 101 S.Ct., at 2369 (quoting *National League of Cities, supra,* 426 U.S., at 845). Instead PURPA, ostensibly pursuant to federal commerce power, seeks to regulate state regulation of commerce under the state's police power, and is therefore a statute that regulates the "States as States."[14]

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[13] 16 U.S.C. (Supp. III) 824a-3(h).

[14] *See Brown v. EPA,* 521 F.2d 827, 839 (CA9, 1975), *vacated and remanded sub nom. EPA v. Brown,* 431 U.S. 99 (1977) (distinguishing "governance of commerce" by the states from "commerce" subject to congressional power: "A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress."); *Maryland v. EPA,* 530 F.2d 215, 228 (CA4, 1975), *vacated and remanded sub nom. EPA v. Brown,* 431 U.S. 99 (1977) ("Inviting Maryland to administer the regulations, and compelling her to do so under threat of injunctive and criminal sanctions, are two entirely different propositions."); *District of Columbia v. Train,* 521 F.2d 971, 992 (CA D.C.

2. PURPA regulates attributes of state sovereignty.

Virginia Surface Mining did not address either the second or the third leg of the *National League of Cities* test because the Court found that SMCRA did not regulate the "States as States." *Virginia Surface Mining, supra,* 101 S.Ct., at 2366; *cf. id.,* at 2369 n.34. Consequently, further development of the test must come from an analysis of its source, *National League of Cities, supra.*

There, the Court struck down those portions of the amendments to the Fair Labor Standards Act of 1938 that imposed federal minimum wage and overtime standards on the states in their capacities as employers, and in so doing overruled *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), because:

> Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz,* allow "the National Government [to] devour the essentials of state sovereignty," 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause.

National League of Cities, supra, 426 U.S., at 855.

Aside from the power of a state to fix its own wage and hour rules, the Court in *National League of Cities* pointed only to the power of a state to decide where to locate or when and if to move the state capitol, *Coyle* v. *Oklahoma,* 221 U.S. 559, 565 (1911), as examples of attributes of state sovereignty that may not be infringed. 426 U.S., at 855. But one feature common to both of these "attributes" is the unfettered power of the sovereign to make up its own mind what to do, which of

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1975), *vacated and remanded sub nom. EPA v. Brown,* 431 U.S. 99 (1977) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.").

course includes the power to decide to do nothing at all.[15] Implicit in this indisputable attribute of sovereignty is the concomitant power to retain operating control of whatever machinery the state may choose to set up, and to dismantle that machinery when and if it sees fit.[16]

But it is precisely these attributes of state sovereignty that the challenged sections of PURPA impair. PURPA does not simply displace or preempt state government; instead, it makes substantive decisions for the states and then forces the states to give effect to those decisions.

Appellants appear to read "attributes of state sovereignty" as synonymous with "areas of traditional functions," a reading of *Virginia Surface Mining* that we respectfully suggest is incorrect. Thus, Appellants begin their discussion of whether an attribute of state sovereignty is being regulated with a recital of the history of dual state and federal regulation of public utilities,[17] a discussion that obviously belongs under the third test of whether the ability to structure areas of traditional functions has been impaired. That concurrent state and federal regulation of public utilities has a long history is simply irrelevant to the question whether PURPA interferes with attributes of state sovereignty.[18] The issue under the second *Virginia Surface Mining* test is not what substantive law has

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[15] "And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is their right to pass, or not to pass, laws." *Maryland v. EPA, supra* n.14, 530 F.2d, at 225 (citing *In re Duncan*, 139 U.S. 449 (1891)).

[16] *See Brown v. EPA, supra* n.14, 521 F.2d, at 840 (suggesting serious doubt whether the federal government could constitutionally prevent a state from withdrawing from a field of regulation).

[17] Appellants' Brief at 30.

[18] Similar concurrent federal and state responsibilities exist in areas such as police protection, sanitation, public health, and parks and recreation, all offered in *National League of Cities* as examples of activities typically performed by states. 426 U.S., at 851.

been displaced; instead, it is what has been done to the sovereignty of the state.

Similarly, Appellants' lengthy discussion of the legislative history[19] is beside the point. First, resort to legislative history may be useful or even required where construction of an ambiguous statute is involved, but no one has even hinted that the statute in suit is ambiguous and in need of construction. Second, the intentions of the conferees and the floor managers cannot change what was actually enacted into law, and it is instructive to note that Appellants' recital of what was *not* enacted were statutory schemes entirely unobjectionable after this Court's decision in *Virginia Surface Mining*. Instead, what emerged from the conference was a bill that attempts to regulate attributes of state sovereignty, and the best intentions of the conferees and the floor managers cannot erase that fact.

3. Compliance with PURPA would directly impair the states' ability to structure integral operations in areas of traditional governmental functions.

The third *National League of Cities* test necessarily includes two components: first, the attribute of sovereignty discussed in 2. above, namely, the freedom of the states to decide *how* to conduct ("structure") their own affairs; and second, whether the area intruded upon is one that traditionally has been a province of state or local government. The Court of Appeals for the Second Circuit has apparently adopted this two-step approach in an effort to decide what exactly was intended by this portion of the *National League of Cities* test.[20]

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[19] Appellants' Brief at 32-35.

[20] "The tenor of the opinion [in *National League of Cities*], however, is that the States must retain the power to make certain choices and decisions in connection with their role as provider of certain public services. The making of these choices and structuring of operations will be termed 'essential governmental decisions.' 426 U.S., at 850. The types of public services that are singled out for protection will be called 'integral governmental functions.' *Id.*, at 855." *United Transportation Union v. Long Island R.R. Co.*, 634 F.2d 19, 24-25 (CA2, 1980) (footnotes omitted), *cert. granted*, ___ U.S. ___, 101 S.Ct. 3107 (1981) (No. 80-1925).

With respect to the first component, the direct impairment of the states' ability to structure their own affairs has been demonstrated in 2. above. The challenged sections of PURPA tell the states not only what to do, but how and when to do it, and they commandeer the instruments of state government in the process. Thus, we agree with Appellants' characterization of PURPA as an act that "obligates the states to perform certain regulatory functions with respect to the utilities that they are already regulating," Appellants' Brief at 35, but disagree that the imposition of this affirmative obligation constitutes a lesser intrusion on sovereignty than would outright preemption, Appellants' Brief at 35-36, n.40.

Unlike SMCRA, and indeed unlike other constituent parts of the National Energy Act,[21] PURPA does not permit the states to decline to enforce its procedural or substantive requirements and to leave the Act to be enforced by the federal government. Under Titles I and III the state regulatory authorities *must* undertake the determinations listed in 1. above, and under Section 210 *must* enforce the federal regulatory program prescribed by the FERC.

Finally, Appellants' argument that Titles I and III do not "force any particular substantive choices upon a state," Appellants' Brief at 36, while perhaps technically true in the sense that states could reject the federal standards, is nevertheless highly misleading. The state regulatory commissions must consider adoption of these policies, whether they want to or not; they must do so under procedural provisions imposed by PURPA, whether the states' legislatures want such procedures or not; and their decision is subject to record review, whether the state courts would otherwise grant such

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[21] The Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. III) 3301 *et seq.*, passed along with PURPA as part of the National Energy Act, also requires certain actions by the states. However, if a state adopts "the 'simple expedient' of not yielding to what she urges is federal coercion," then " 'the full burden will be borne by the Federal Government.' " *Oklahoma v. FERC*, Nos. 80-2748, 80-2824, slip op. at 14, 16 (CA10, September 22, 1981) (citations omitted). *See also* The National Energy Conservation Policy Act, 42 U.S.C. (Supp. III) 8201 *et seq.*

review or not. It is no answer that the states retain some limited ability "to determine the manner of implementation." Appellants' Brief at 37. The simple fact is that the states' ability to structure their own internal operations has not only been impaired, but has to a significant degree been displaced altogether.

With respect to the second component, there simply can be no question that the states have regulated public utilities and other natural monopolies of all sorts as one of their "integral," or "traditional" and certainly primary functions. *See Munn* v. *Illinois*, 94 U.S. 113, 125-130 (1876) (detailing regulation since pre-Revolutionary times of business affected with a public interest).

Appellants' conclusion that because the states and the federal government have concurrent jurisdiction the imposition of "a minimal burden" upon such traditional functions is somehow rendered permissible does not follow. We do not confront a situation where "individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside"[22] are being regulated but instead a situation in which the state regulators are being regulated. That "Congress was . . . careful to minimize federal interference with state governmental functions," Appellants' Brief at 38, does not make that interference constitutional.

In any event, the burden is far from minimal. In practice, the substantive and procedural requirements imposed on the states by PURPA have worked an enormous imposition on the state instrumentalities charged with public utility regulation. By the Department of Energy's (DOE) count, PURPA could require as many as 4,208 separate determinations by the nation's state regulatory authorities, and not less than 1,428 determinations even if virtually all of the required determina-

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[22] *Virginia Surface Mining, supra*, 101 S.Ct., at 2369 (quoting *National League of Cities, supra*, 426 U.S., at 845).

tions are made in generic hearings.[23] And as of May, 1981, the Secretary or his designees had intervened in state regulatory authority proceedings in eleven different states.[24]

In short, PURPA sets a federal agenda for the states to implement and denies the states and their instrumentalities the flexibility to consider or not to consider the matters confronting their electric utilities in the manner they see fit. Appellants' concession that PURPA does not *require* the states to establish public service commissions, Appellants' Brief at 35, will doubtless come as a great relief to the State of Nebraska (which alone has no state regulatory authority subject to PURPA), but it will be a small comfort to the remaining forty-nine states whose agenda and procedures have been displaced from an area of traditional governmental function.

B. Related Cases Support A Finding That PURPA Is Unconstitutional.

1. The EPA cases.

In *Virginia Surface Mining* the Court placed considerable emphasis on the structure of SMCRA, pointing out that the statute "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." If the states elect not to participate, that is their choice and "the full regulatory burden will be borne by the Federal Government." *Virginia Surface Mining, supra,* 101 S.Ct., at 2366. The Court cited three lower court decisions that struck down attempts by the Administrator of the Environmental Protection Agency to force states to enact and enforce a federal regulatory program[25] as examples of impermissible attempts to

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[23] Department of Energy Annual PURPA Report to Congress (hereinafter cited as DOE Report), at 9 fn* (1981).

[24] DOE Report, note 23 *supra,* at 56-57.

[25] *Maryland v. EPA, supra* n.14, 530 F.2d, at 224-28; *District of Columbia v. Train, supra* n.14, 521 F.2d, at 990-94; *Brown v. EPA, supra* n.14, 521 F.2d, at 837-42.

"commandeer the legislative processes of the States." *Ibid.* Yet the challenged sections of PURPA do more than commandeer the legislative process of the states: the challenged sections purport to enact legislation *for* the states; they intrude directly on the executive power of the states by prescribing *how* administrative agencies shall go about discharging their functions; and they intrude upon the state judicial functions by prescribing rules of decision[26] in contested cases and by altering the standing and intervention rules of state courts. If the federal government may not be permitted to "commandeer the legislative processes of the States" on Tenth Amendment grounds, as the government appears to have conceded, *see EPA* v. *Brown, supra,* 431 U.S., at 103, it should likewise not be permitted to commandeer the executive and judicial processes of the states either, for as Mr. Justice Douglas stated:

> If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment.

Maryland v. *Wirtz, supra,* 392 U.S., at 205 (Douglas, J., dissenting).

2. *Testa v. Katt* is inapposite, and *Kentucky v. Dennison* remains good law.

Appellants suggest that the authority of the federal government to impose affirmative duties on state officers is upheld by *Testa* v. *Katt,* 330 U.S. 386 (1947), and that the counter authority of *Kentucky* v. *Dennison,* 65 U.S. (24 How.) 66 (1861), "and similar cases have not survived as precedent," citing *Monell* v. *New York City Department of Social Services,* 436 U.S. 658, 676 (1978). Appellants' Brief at 29-30 n.34.

These suggestions are both inaccurate and misleading. In the first place, *Testa* v. *Katt* held only that state courts could

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[26] That a "rule of decision", if prescribed by Congress for the federal courts, would violate separation of powers principles is suggested by *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872). See footnote 42 *infra.*

not refuse to hear a private action for treble damages that arose under a federal statute when the state courts already heard similar claims based on state law; it says absolutely nothing about state administrative agencies. Thus, *Testa* v. *Katt* can be read as requiring no more than that state courts not *discriminate* against federal causes of action when adequate state court jurisdiction already exists and there is no "valid excuse" for the state refusal to hear the case. *Testa* v. *Katt, supra,* 330 U.S., at 392. Even if *Testa* v. *Katt* is read to require state courts of otherwise competent jurisdiction to adjudicate claims based on valid federal law, that requirement is far removed from requiring each state regulatory authority to consider a federal agenda of federal concerns under federal procedures, PURPA Titles I and III, and to "implement [FERC rules], after notice and an opportunity for hearing, . . . for each electric utility for which it has ratemaking authority," PURPA § 210(f). Furthermore, the question whether jurisdiction may be thrust upon and standing rules enforced against an unconsenting state's judicial system is quite a different matter, and certainly not one answerable on the authority of *Testa* v. *Katt.*[27]

Several *amici* in support of Appellants have suggested that, since under Section 210 federal rights are only being enforced "to resolve disputes between" private parties,[28] nothing more than a federal rule of decision is involved and therefore the

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[27] *See Brown v. Gerdes,* 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) (only a state may create and confer jurisdiction upon its own courts). *See generally* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System,* 434-38, 571-72 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 507-08 (1954).

[28] *See, e.g.,* Brief of *Amici* Maryland, *et al.,* at 16-17, suggesting that the Mississippi Public Service Commission is a "quasi-judicial" body because one of the ways it can comply with Section 210 of PURPA is by "undertaking to resolve disputes between qualifying facilities and electric utilities" in accordance with FERC rules, 18 C.F.R. § 292.401(a).

state regulatory authority is acting in a quasi-judicial capacity, not a quasi-executive or a quasi-legislative capacity.[29] That is not true.

The "disputes" to be resolved by the Mississippi Public Service Commission (MPSC) under the FERC regulations relate to the ratemaking provisions of Section 210 — hence the reference in that section to "each electric utility for which it has *ratemaking* authority" — and the Mississippi Supreme Court has uniformly held that ratemaking is legislative in character,[30] as has this Court.[31] Thus, not only Section 210 but also Titles I and III of PURPA interfere with a legislative function of the state government, and, consequently, are analogous to and suffer from the same infirmity as the EPA regulations considered in *Brown* v. *EPA*, and the related cases listed in note 14 *supra*.

Alternatively, if it is thought that a quasi-judicial function is involved in giving effect to Section 210 FERC rules, *Testa* v. *Katt* is still irrelevant because that case at most requires states to hear federal claims *only* when they have jurisdiction to hear

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[29] The functions performed by administrative agencies, both state and federal, have been variously described as quasi-legislative, quasi-executive, or quasi-judicial, but as Mr. Justice Jackson remarked, "retreat to the qualifying 'quasi' . . . is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting.). We submit that resolution of this case ought not to turn on any purported distinction between "quasi-legislative" or "quasi-judicial" functions.

[30] *Miss. Pub. Serv. Comm'n v. Hinds County Water Co.*, 195 So.2d 71, 78 (Miss. 1967) ("It is beyond question that the function of ratemaking in this state is purely legislative in character. . . . We have firmly established this rule in a number of cases.") *Accord, Miss. Pub. Serv. Comm'n v. Mississippi Power Co.*, 366 So.2d 656, 659 (Miss. 1979); *Miss. Pub. Serv. Comm'n v. Mississippi Power Co.*, 337 So.2d 936, 939 (Miss. 1976); *United Gas Corp. v. Miss. Pub. Serv. Comm'n*, 127 So.2d 404, 409 (Miss. 1961); *Southern Bell T&T Co. v. Miss. Pub. Serv. Comm'n*, 113 So.2d 622, 658 (Miss. 1959).

[31] *E.g., Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945) (citing *Munn v. Illinois*, 94 U.S. 113, 133-34 (1876)).

similar claims arising under state law. Thus, even if *Testa* v. *Katt* is applicable to state administrative agencies, the most that the MPSC must consider is a federal claim if and only if the MPSC's jurisdiction as prescribed by state laws is adequate to the occasion. But "a sale from a cogenerator to a utility is a wholesale transaction" and thus is a sale in interstate commerce. Appellants' Brief at 38. This Court long ago held in *Public Utilities Comm'n of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that such wholesale transactions in interstate commerce may *not* be burdened or otherwise regulated by the states.[32] "[I]f such regulation is required it can only be attained by the exercise of the power vested in Congress." *Id.*, at 90. Thus, not only does the MPSC not have jurisdiction to regulate these transactions under state law, but any attempted assertion of such jurisdiction by the state would be unconstitutional. It can hardly be argued that *Testa* v. *Katt* requires unconsenting state administrative agencies to exercise jurisdiction in an area beyond their constitutional reach.

With respect to the Appellants' suggestion that Chief Justice Taney's opinion in *Kentucky* v. *Dennison, supra,* has not survived as precedent, that is quite simply not so. The cited authority, *Monell* v. *New York City Department of Social Services, supra,* involved the question whether municipalities could be held liable for damages under §1983, a statute enacted to enforce the Civil War Amendments. These Amendments, as is clear from this Court's cases, stand on quite a different footing than the rest of the Constitution because they are intended to regulate the states as states, and "appropriate legislation" to enforce federal rights secured by those Amendments is accordingly not susceptible to Tenth

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[32] Indeed, the "Attleboro gap" was the impetus for Part II of the Federal Power Act, enacted to close that gap. This Court has since held that virtually all sales of electric energy to interconnected, multi-state utilities are sales for resale in interstate commerce subject to FERC jurisdiction. *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972). *See id.*, at 475 n.4 (Douglas, J., dissenting); *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964); *see generally Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 307-08 (1924).

Amendment attack. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). *Kentucky* v. *Dennison* has never been overruled, and the two cases cited by the Court in *Monell* for the proposition that other analogous precedent has not survived either involve enforcement of federal rights guaranteed by the Civil War Amendments, *Ex Parte Virginia*, 100 U.S. 339 (1880), or federal taxation of state employees, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939). Other than in these limited contexts, Chief Justice Taney's statement that

> the Federal Government, under the Constitution, has no power to impose on a State Officer, as such, any duty whatever, and compel him to perform it . . .,

Dennison, supra, 65 U.S. (24 How.), at 107, remains as sound in principle as it is as precedent. *Brown* v. *EPA, supra* n.14, 521 F.2d, at 841-42.

C. Administrative Convenience Should Not Be Allowed To Overcome Constitutional Principles.

It is no answer to the foregoing arguments that the intrusion on the states' sovereignty by the federal government through the PURPA legislation is necessary because the federal government does not have the administrative machinery available to enforce its program, or that federal enforcement would in any case be inefficient and impractical, and therefore that the federal government must rely on state apparatus. A similar justification was offered by the EPA Administrator and rejected by three courts of appeals, see note 14 *supra*, one court noting that "We are of opinion that constitutional principles may not be violated for administrative expediency. . . ." *Maryland* v. *EPA, supra* n.14, 530 F.2d, at 227.

It is likewise no justification that the intrusion by PURPA on the states' sovereignty is allegedly modest and that whole areas of state activity remain unaffected. As the Court of Appeals for the Ninth Circuit observed in *Brown* v. *EPA, supra* n.14, 521 F.2d, at 842,

> [W]e reject as a means of allaying our fears the assumption that the prospect of "utter destruction of the State as a sovereign political entity" is confronted only when

> Congress asserts the power to regulate all aspects of state and local government. Only the mischievous would contend that not until then is the issue ripe.

Finally, Appellants' further suggestion that the enforced substitution of federal procedures for those of a state "can be no ground of complaint here" because Mississippi already has similar requirements of its own, Appellants' Brief at 36-37, is beside the point: PURPA is addressed to all states nationwide, not just Mississippi, and if allowed to stand these federal procedures will have permanently displaced Mississippi's procedures. For Appellants to conclude that "the proceedings of the Mississippi Public Service Commission need not be altered significantly, if at all," *ibid,* is thus to ignore that Mississippi procedure has been replaced with federal procedure, and that Mississippi, and every other state, has to that extent lost the power to control or change its own laws.

II

NO "BALANCING" TEST IS WARRANTED; BUT IF A BALANCING TEST IS APPLIED, PURPA FAILS.

Virginia Surface Mining contains a warning that even if all three *National League of Cities* tests are met, a Tenth Amendment challenge may yet fail in "situations in which the nature of the federal interest advanced [is] such that it justifies State submission," *Virginia Surface Mining, supra,* 101 S.Ct., at 2366 n.29 (citing *Fry* v. *United States,* 421 U.S. 542 (1975), and signalling "*see also*" Mr. Justice Blackmun's concurrence in *National League of Cities, supra,* 425 U.S., at 856).

Contrary to Appellants, we do not believe that the instant case warrants a "balancing" approach, if indeed such an approach would ever be justified. The concerns reflected in the Tenth Amendment and echoed in the decisions of this Court strongly suggest that the interest in preserving the states as sovereign partners in our federal system will only be over-

ridden in cases where the supreme command of the Constitution is unmistakable, a situation not presented by this case.[»]

Fry was reaffirmed in *National League of Cities*, notwithstanding that the attribute of state sovereignty displaced in both cases was virtually identical: the power to set wages. The Court distinguished *Fry* because in that case an emergency situation susceptible of remedy only by the national government "endangered the well-being of all the component parts of our federal system," because the intrusion on the states' freedom would last only for "a very limited, specific period of time," because the states were only being compelled to adhere to choices they had already made, and because the federal command reduced the pressure on state budgets. *National League of Cities, supra*, 426 U.S., at 853. In short, *Fry* was confined to its special facts. Those facts cannot be transposed to fit the facts of the instant case. PURPA, although part of an ongoing federal effort to deal with the energy concerns of the nation, is not a modest intrusion that will last for a limited, specific period of time but instead is a permanent intrusion

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[»] *See Virginia Surface Mining, supra*, 101 S.Ct., at 2365 n.28, and authorities collected therein. *See also National League of Cities, supra*, 425 U.S., at 854 n.18 ("Nothing we say in this opinion addresses the scope of Congress' authority under its war power."). Prompted by the reference in *National League of Cities* to the war power, several *amici* argue in support of Appellants that a mere recital of the phrase "national security" in PURPA shifts the balance toward constitutional validity. The cases cited in support of this proposition, however, involve legislation that directly implemented the War Powers clauses of the Constitution, Art. I, § 8, cl. 11, 12, 13 and 14, enabling Congress to declare war, raise and support armies, maintain a navy, and regulate the land and naval forces. None of these powers is even remotely implicated by the statute in suit. Furthermore, the mere recitation in a statute that "national security" considerations prompted its enactment ought not to validate otherwise constitutionally infirm legislation. *Cf. United States v. Robel*, 389 U.S. 258, 263 (1967), in which the Court held that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."

that works a large disruption in the states' procedural and substantive law. It compels states to adhere to choices they have most emphatically not already made for themselves. And if the energy concern is to be treated as an emergency endangering all the component parts of our federal system, it must be pointed out that the "emergency" has been around for quite some time, with no end in sight. We respectfully submit that the legislation before the Court does not warrant the exceptional treatment of *Fry*.

Mr. Justice Blackmun's concurrence in *National League of Cities* has been read by several lower courts[34] as requiring a balancing test, and footnote 29 of *Virginia Surface Mining, supra*, may suggest the same result. Yet Mr. Justice Blackmun's concurrence was by its terms addressed to state "*facility*" compliance with federal environmental protection standards. In this respect it is entirely consistent with the principles of *United States* v. *California*, 297 U.S. 175 (1936) (holding that a state that operates a railroad in interstate commerce may be subject to federal regulation applicable alike to all other common carriage by rail in interstate commerce); and it has been followed in the EPA cases, note 14 *supra*, in which the courts of appeals without exception held that facilities run by the states were subject, like any other stationary pollution source, to federal environmental regulation.

A. The Balancing Test Focuses Upon The Nature Of The Federal Interest And The Degree Of Intrusion On State Sovereignty.

To the extent a balancing test must be applied at all, it does not include an inquiry into the "need" for the legislation in question. See Appellants' Brief at 42 (referring to "Congress' deep concern about the nation's increasing dependence on imported oil"). Indeed, such an analysis would put this Court

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[34] *See, e.g., United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1205 (CA 6, 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 2031 (1981); *Friends of the Earth v. Carey*, 552 F.2d 25, 37-38 (CA2), *cert. denied*, 434 U.S. 902 (1977).

in the untenable position of second-guessing the need for, and thereby the wisdom of, congressional action.[35] Rather, the test, if even necessary here, involves both the "nature of the federal interest," *Virginia Surface Mining, supra,* 101 S.Ct., at 2366 n.29, and "the degree of intrusion upon the protected area of state sovereignty," *National League of Cities, supra,* 426 U.S., at 852.

The thrust of the inquiry into the "nature of the federal interest" focuses not so much on the seriousness of the problem sought to be remedied, but whether a uniform nationwide response is necessary. Thus, in *National League of Cities* the Court reaffirmed its holding in *Fry,* noting that *Fry* involved a "problem which endangered the wellbeing of all the component parts of our federal system and which only collective action by the National Government might forestall." *Id.,* at 853. It is difficult to find the need for such a response in much of the legislation now before the Court. For example, Titles I and III require states to consider national standards, yet make the adoption of these substantive standards optional, 16 U.S.C. (Supp. III) 2627; 15 U.S.C. (Supp. III) 3208, thus implicitly recognizing that a uniform nationwide response is not required.

Against a federal interest that implicitly recognizes no need for nationwide uniformity must be balanced "the degree of intrusion upon the protected area of state sovereignty." *National League of Cities, supra,* 426 U.S., at 852. The degree of the intrusion by PURPA has been demonstrated in Part I above and is sufficiently great to meet all three requirements of the *Virginia Surface Mining* test. Furthermore, PURPA's pervasive regulation of state regulation of commerce is particularly offensive in that alternative, less intrusive means remain available to Congress to give effect to the purported federal interest.

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[35] *See* R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1235-37 (1977).

B. Less Intrusive Means Are Available.

We assume as given that the federal government has as great an interest as the states in preventing intrusions upon state sovereignty in order to preserve the constitutional framework of "Our Federalism,"[36] a phrase bequeathed to us by Mr. Justice Black, which, together with the discussion accompanying it, Judge Friendly has called:

> the most eloquent statement on the subject since Chief Justice Chase's reference to "an indestructable Union, composed of indestructable States."[37]

The courts of appeals that denied EPA the power to enforce cooperation from unwilling states pointedly suggested that such cooperation could be induced by imposition of conditions on federal grants to state and local governments.[38] This Court likewise has recognized that use of a "carrot" rather than a "stick" may operate as an inducement to "cooperative federalism," *see Virginia Surface Mining, supra,* 101 S.Ct., at 2357 n.5, 2366; and in *National League of Cities* the Court expressly left open the possibility that "different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1 . . . ," 426 U.S., at 852 n.17.[39]

To some very limited extent the Congress has availed itself of these tools in PURPA. It has made funds available to the states, but only for the purpose of assisting state regulatory authorities to defray the costs of federally directed compli-

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[36] *Younger v. Harris,* 401 U.S. 37, 44-45 (1971).

[37] H. Friendly, *Federalism: A Foreward,* 86 Yale L.J. 1019 (1977) (quoting *Texas v. White,* 74 U.S. (7 Wall.) 700, 725 (1869)).

[38] *Maryland v. EPA, supra* n.14, 530 F.2d, at 228; *District of Columbia v. Train, supra* n.14, 521 F.2d, at 993 n.26.

[39] *See also Oklahoma v. United States Civil Service Comm'n,* 330 U.S. 127, 143 (1947) (while Congress may not extend the Hatch Act to regulate political activities of state officials, it may impose like limitations on states as a condition of receiving federal money).

ance, not for the quite different purpose of inducing compliance in the first place, *see* Appellants' Brief at 12 n.18, and 36 n.41. Furthermore, whole sections of PURPA rely on direct enforcement against states that have elected not to govern electric utilities as the Department of Energy directs. *Cf. Brown* v. *EPA, supra* n.14, 521 F.2d, at 832; *see National League of Cities, supra,* 426 U.S., at 853.

In the context of a case that raises significant Tenth Amendment concerns, the interest of both the states and the federal government in preserving our federal system of dual sovereignty warrants imposition of a standard requiring the federal government to demonstrate that the means selected to give effect to the federal interest are the least intrusive on the states' sovereign rights. This type of analysis has been mandated in other constitutional contexts. For example, before governmental interference with First Amendment rights will be tolerated, the government must demonstrate "a sufficiently important interest and *[employ] means closely drawn to avoid unnecessary abridgment*" of such rights. *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976) (emphasis added).

We respectfully submit that the Appellants have failed to show that Congress chose the least intrusive means available to accomplish otherwise legitimate federal ends, and accordingly that on balance those portions of PURPA in suit should be held unconstitutional.

C. Federalism Considerations Recognized By The Court In Analogous Cases Require That PURPA Be Held Unconstitutional.

Outside of the Tenth Amendment cases, the Court has in recent years shown growing concern over the pervasive interference by the national government with state and local autonomy. For the most part, the cases have dealt with intrusions by the lower federal courts into state and local affairs, but the sensitivity of this Court to such intrusions by the judicial branch should apply equally to intrusions by the executive and legislative branches of the national government into state and local affairs. The reason is simple: nothing in the

principles of federalism and comity applicable to the federal courts suggests that those same principles should not apply equally to the federal executive and legislative branches.

This Court has expressed its concern for the sovereignty of the states in our federal system in a variety of contexts. With respect to federal interference with the states' judicial systems, *Younger* v. *Harris*, note 36 *supra*, announced the rule that, absent bad faith or extraordinary circumstances, principles of federalism and comity, as well as equity, preclude injunctions against pending state criminal prosecutions. These principles of federalism have been extended to curb a whole host of analogous intrusions by the federal courts into state judicial processes,[40] and by federal courts into state and local executive branch functions.[41] Furthermore, the Court has held that, while reliance on federal principles of separation of powers may have been "in part misplaced" in seeking to resist interference by a federal court with a local executive officer's appointments, nevertheless, "the Court of Appeals did not assign appropriate weight to the constitutional considerations raised by the Mayor."[42] *Mayor of Philadelphia* v. *Educa-*

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[40] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Samuels v. Mackell*, 401 U.S. 66 (1971).

[41] *Rizzo v. Goode*, 423 U.S. 362 (1976) (vacating an injunction that would have had the effect of restructuring the Philadelphia police department and limiting that department's latitude in the dispatch of its own internal affairs); *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926) (Holmes, J.) (injunction against state executive officers "clothed with authority to enforce the law" ought not to issue except in very special circumstances) (cited with approval, *Huffman v. Pursue, Ltd.*, *supra* n.40, 420 U.S., at 603).

[42] Specifically, "to the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are in point." *Mayor*

tional Equality League, 415 U.S. 605, 615 (1974).[43] These cases, together with the abstention cases,[44] sound a single clear theme: the values of pluralism reflected in the constitutional division of power between the states and the federal government are not to be lightly tossed aside in favor of federal hegemony.[45] An exception to this general principle of fed-

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of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974).

We submit that an appropriate analogy to this Court's separation of powers cases may be drawn in a Tenth Amendment case such as this one, for just as an encroachment by one co-equal branch of the federal government upon another threatens the balance of the system, so does an encroachment by the federal government on the sovereignty of the states threaten the balance between delegated and reserved power. Thus, while the Court has recognized that Congress has plenary control over the jurisdiction of the lower federal courts, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), and over the appellate jurisdiction of the Supreme Court, *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), this Court has refused, on separation of powers grounds, to allow the Congress to prescribe a rule of decision under the guise of a purported limitation on jurisdiction, *United States v. Klein*, note 26 *supra*.

[43] *See also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (various considerations, including federalism, counsel a more restrained form of review in a state school funding case); *Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974) (reluctance to allow federal district court, in a school desegregation case, to become first "a *de facto* 'legislative authority' to resolve complex questions and then the 'school superintendent' for the entire area"); *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (citation omitted):

> Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

[44] *See, e.g., Askew v. Hargrave*, 401 U.S. 436 (1971); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *see generally Hart & Wechsler, supra* n.27, at 985-97.

[45] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

eralism is of course recognized in the case of legislation enforcing the Civil War Amendments, which were "adopted with the specific purpose of limiting State autonomy," *Virginia Surface Mining, supra,* 101 S.Ct., at 2365-66 n.28, but it is the exception that proves the rule. Even in the case of the antitrust laws, where the federal government has announced in the most categorical terms an overriding and paramount national interest, sovereign actions of the states are quite simply not within the scope of that law or policy, *Parker* v. *Brown,* 317 U.S. 341, 351 (1943), a decision of the Court that was "firmly grounded on principles of federalism," *City of Lafayette, La.* v. *Louisiana P. & L. Co.,* 435 U.S. 389, 421 (1978) (Burger, C.J., concurring).

Finally, this is not a case in which it is necessary to engage in the business of line drawing based on the distinction between "governmental" and "proprietary" activities,[46] for with the exception of heretofore unregulated utilities, *see supra* n.4, what the challenged sections of PURPA regulate is state regulation of commerce. We respectfully submit that under the authority of earlier decisions of the Court sounding in the Tenth Amendment and principles of federalism inherent in "a dual system of government," *Parker* v. *Brown, supra,* 317 U.S., at 351, the provisions of PURPA in suit should be held unconstitutional.[47]

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[46] *Compare United States* v. *California,* 297 U.S. 175 (1936), *with Fry* v. *United States, supra,* 421 U.S., at 558 n.2 (Rehnquist, J., dissenting), *and City of Lafayette, La.* v. *Louisiana P. & L. Co., supra,* 435 U.S., at 418 (Burger, C.J., concurring).

[47] Appellants' statement that the district court erred in striking down all of Titles I and III and Section 210 because certain provisions are constitutional, Appellants' Brief at 43 n.45, misses the point entirely. Specific sections of PURPA cannot be salvaged from an otherwise invalid statutory scheme simply because they impose responsibilities directly upon utilities and therefore do not violate the Tenth Amendment. In order to give effect to such provisions, the Court must conclude that Congress would have enacted them independently of the statutory provisions that are constitutionally infirm. *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932); *Buckley* v. *Valeo, supra,* 424 U.S., at 108-09.

As a starting point in this determination, it is noteworthy that Con-

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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gress failed to include in PURPA the standard severability clause. Moreover, the statutory scheme itself suggests that little if any of Titles I and III and Section 210 is severable from those provisions that are invalid under the Tenth Amendment. Though Congress might have separately enacted Section 210(e) of PURPA, exempting cogeneration and small power production facilities from certain federal and state statutes and regulations, it is doubtful that Congress would have enacted Titles I and III and the remainder of Section 210 solely to regulate the limited portions of the electric and natural gas utility industries comprised of utilities not subject to state regulation. *See Sloan* v. *Lemon*, 413 U.S. 825, 833-34 (1973). Furthermore, nothing in the statute or in its legislative history suggests that the reporting requirements imposed on electric utilities by Title I have any intended function other than providing an information base for implementation and oversight of the unconstitutional directives to state regulatory authorities. Consequently, such provisions must also fall as inseverable from the constitutionally invalid provisions of PURPA. *See Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241-44 (1929).